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Supreme Court of the United States

OCTOBER TERM—1930.

No. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

against

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE ON BEHALF OF FRANKLIN W. M. CUTCHEON.

CARL TAYLOR,
ROLLIN BROWNE,
Amici Curiae.

TAYLOR, BLANC, CAPRON & MARSH,
CARTER T. LOUTHAN,
Of Counsel.

PRINTED IN THE UNITED STATES BY BENJ. H. TYRREL, INC., 110 GREENWICH ST., NEW YORK.

SUBJECT INDEX.

PAGE

REFERENCE TO FACTS 3

POINTS OF ARGUMENT 4

POINT I. Section 611 of the Revenue Act of 1928 was not intended to apply retroactively to any case where the refund claim was filed prior to its enactment 5

POINT II. Section 611 should not be construed as applicable to a personal action against a Collector to recover taxes illegally collected, particularly if it is construed as a withdrawal by the sovereign of its consent to be sued..... 9

POINT III. Section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes for the year 1917 upon the expiration of five years from the filing of the 1917 return 13

POINT IV. Section 611 of the Revenue Act of 1928, if construed as an attempt to deprive taxpayers of their vested rights in the completed bar of Section 250 (d) of the Revenue Act of 1921, is void under the Fifth Amendment to the United States Constitution 17

POINT V. Section 611 did not reimpose the tax in suit nor ratify the collection thereof..... 19

POINT VI. Section 611, if construed as reimposing the tax in suit or ratifying its collection, is void under the Fifth Amendment..... 22

TABLE OF CASES CITED.

	PAGE
Bashara *v.* Hopkins, 290 Fed. 592	16
Belknap *v.* Schild, 161 U. S. 10	12
Bowers *v.* New York & Albany Lighterage Co., 273 U. S. 346	5, 11, 13, 14, 21, 23, 24
Campbell *v.* Holt, 115 U. S. 620	14, 18
Charlotte Harbor Railway *v.* Welles, 260 U. S. 8	26
Citizens' Bank *v.* Miller-Link Lumber Co., 16 Fed. (2d) 163	16
Cummings *v.* Missouri, 4 Wall. 277	28
Davis *v.* Mills, 194 U. S. 451	16
DeLima *v.* Bidwell, 182 U. S. 1	9
Diaz *v.* United States, 223 U. S. 442	11
Dobbins *v.* Commissioner, 31 Fed. (2d) 935	17
Ellay Co. *v.* Bowers, 25 Fed. (2d) 637; cert. denied 277 U. S. 606	11
Elliott *v.* Swartwout, 10 Pet. 137	9
Erskine *v.* Van Arsdale, 15 Wall. 75	9
Forbes Boat Line *v.* Board of Commissioners, 258 U. S. 338	18, 26
Forster *v.* Forster, 129 Mass. 559, 561, 562	27
Frew *v.* Bowers, 12 Fed. (2d) 625	26
Garland, *Ex Parte*, 4 Wall. 333	28
Graham *v.* Dupont, 262 U. S. 234	10, 13
Gulf, Colorado & Santa Fé Ry. Co. *v.* Ellis, 165 U. S. 150	26
Kansas City Southern Railway *v.* Wolf, 261 U. S. 133	18
Kepner *v.* United States, 195 U. S. 100	11

PAGE

Lincoln *v.* United States, 202 U. S. 484.....11, 20, 21, 22
Logan *v.* United States, 144 U. S. 263..... 11

McCord *v.* Sullivan, 85 Minn. 344 19
Minnesota *v.* Hitchcock, 185 U. S. 373..... 12
Morgan's Louisiana & Texas Railroad & S.S. Co. *v.* Cocke, 273 U. S. 656 ..... 16, 17

Nichols *v.* Coolidge, 274 U. S. 531..... 26

Pacific Whaling Co. *v.* United States, 187 U. S. 447 9
Peninsula Produce Exchange *v.* New York P. & N. R.R. Co., 152 Md. 594, aff'd. 276 U. S. 599... 16, 17
Philadelphia Co. *v.* Stimson, 223 U. S. 605..... 12
Philadelphia Lawn Mower Co. *v.* Commissioner, 16 B. T. A. 435 23
Phillips *v.* Grand Trunk Railway, 236 U. S. 662.. 18

Railroad Company *v.* Alabama, 101 U. S. 832..... 12
Railroad Company *v.* Tennessee, 101 U. S. 337.... 12
Rafferty *v.* Smith, Bell & Co., 257 U. S. 226..... 19
Regla Coal Company *v.* Bowers, 37 Fed. (2d) 373. 18, 22
Russell *v.* United States, 278 U. S. 181..... 8, 13

Sage *v.* United States, 250 U. S. 33..... 12
Schlesinger *v.* Wisconsin, 270 U. S. 230 26
Smietanka *v.* Indiana Steel Co., 257 U. S. 1..... 12

Thornhill Wagon Co. *v.* Noel, 17 Fed. (2d) 407.... 11
Toxaway Mills *v.* United States, 61 Ct. Cls. 363, rev'd 273 U. S. 781.....14, 15, 18

Union Pacific R.R. Co. *v.* Laramie Stock Yards Co., 231 U. S. 190 8
United States *v.* Chandler-Dunbar Co., 209 U. S. 447 16

PAGE

United States *v.* Heinszen & Co., 206 U. S. 370.... 19
United States *v.* John Barth Co., 27 Fed. (2d) 782; rev. 279 U. S. 370 ..... 16, 17
United States *v.* Jones, 218 Fed. 973..... 16
United States *v.* Lee, 106 U. S. 196..... 12
United States *v.* Magnolia Petroleum Co., 276 U. S. 160 8
United States *v.* Mooney, 116 U. S. 104 11

Veeder *v.* Commissioner, 36 Fed. (2d) 342..... 25

Wettengel *v.* Robinson, 289 Pa. 525; 136 Atl. 673 .....17, 18, 23
William Danzer & Co. Inc. *v.* Gulf & Ship Island Railroad Co., 268 U. S. 633 ..... 16, 17
Williams *v.* Peyton, 4 Wheaton 77..... 27
Winona & St. Peter Railroad Co. *v.* United States, 165 U. S. 483..... 16
Wyman, Partridge & Co. *v.* United States (Ct. of Cls.), 41 Fed. (2d) 886..... 17, 18

TABLE OF STATUTES CITED.

Revenue Act of 1916..... 19

Revenue Act of 1918:
Section 250 (d)..... 16

Revenue Act of 1921:
Section 250 (d).....13, 15, 16, 17, 19, 25, 26

Revenue Act of 1924:
Section 1014 19

Revenue Act of 1926:
Section 278 (e)..... 13
Section 906 (e)..... 17, 23
Section 1106 (a).....5, 11, 14, 16, 17, 21

Revenue Act of 1928: PAGE
Section 601 ..... 17, 23
Section 607 ..... 6, 9, 10, 11
Section 611 ..... 3, 5, 6, 10, 11, 18, 21, 23, 26, 28
Section 612 16
Section 619 (b) 10
Section 716 6

Revised Statutes:
Section 3220 ..... 9, 10
Section 3226 ..... 9, 10

TABLE OF REGULATIONS AND RULINGS CITED.

Regulations 33, Article 261 25
Regulations 45, Article 1032 25
Regulations 62, Articles 1006, 1012, 1032 25

General Counsel's Memoranda:
No. 2581, Int. Rev. Cum. Bull., Vol. VI-2, p. 95 10
No. 2757, Int. Rev. Cum. Bull., Vol. VII-2, p. 302 25
No. 4197, Int. Rev. Cum. Bull., Vol. VII-2, p. 87 23
No. 6296, Int. Rev. Cum. Bull., Vol. VIII-2, p. 152 24
No. 6308, Int. Rev. Cum. Bull., Vol. VIII-1, p. 132 26

I. T. 1333, Int. Rev. Cum. Bull., Vol. I-1, p. 305 25
Mimeograph 3660, Int. Rev. Cum. Bull., Vol. VII-2, p. 82 23

TABLE OF MISCELLANEOUS CITATIONS.

Congressional Record, Vol. 67, part 4, p. 3531 14
House of Representatives Report:
No. 356, 69th Congress, First Sess., p. 55 15
No. 2, 70th Congress, First Sess., p. 34 21
Wade on Retroactive Laws 18

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No. 36.

R. E. GRAHAM and E. E. FOSTER, Co-partners, doing business under the firm name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

against

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Mr. Franklin W. M. Cutcheon, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

CARL TAYLOR
ROLLIN BROWNE
Counsel for Mr. Franklin W. M. Cutcheon,
as *Amici Curiae.*

Supreme Court of the United States,
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae* on behalf of Mr. Franklin W. M. Cutcheon from whom the Collector of Internal Revenue for the First District of New York illegally exacted payment of income taxes for 1918 after the statute of limitations had barred the collection thereof. Mr. Cutcheon recovered judgment for the amount so exacted, in a personal action against the Collector, in the United States District Court for the Eastern District of New York. The case is now pending on appeal before the Second Circuit Court of Appeals. The defendant in that action has pleaded Section 611 of the Revenue Act of 1928 as a bar to recovery.

POINTS OF ARGUMENT.

POINT I.

Section 611 of the Revenue Act of 1928 was not intended to apply retroactively to any case where the refund claim was filed prior to its enactment.

POINT II.

Section 611 should not be construed as applicable to a personal action against a Collector to recover taxes illegally collected, particularly if it is construed as a withdrawal by the sovereign of its consent to be sued.

POINT III.

Section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes for the year 1917 upon the expiration of five years from the filing of the 1917 return.

POINT IV.

Section 611 of the Revenue Act of 1928, if construed as an attempt to deprive taxpayers of their vested rights in the completed bar of Section 250 (d) of the Revenue Act of 1921, is void under the Fifth Amendment to the United States Constitution.

POINT V.

Section 611 did not reimpose the tax in suit nor ratify the collection thereof.

POINT VI.

Section 611, if construed as reimposing the tax in suit or ratifying its collection, is void under the Fifth Amendment.

POINT I.

Section 611 of the Revenue Act of 1928 was not intended to apply retroactively to any case where the refund claim was filed prior to its enactment.

So far as we have been able to ascertain this point has not heretofore been presented to any court in any of the cases involving Section 611. We believe it is conclusive, and the succeeding Points II-VI have been added merely out of an abundance of caution.

The case at bar is not a suit for a refund of taxes overpaid or wrongfully assessed, but is a common law action against the Collector personally for money had and received, growing out of the illegal exaction by duress of money claimed to be due for taxes, but the collection of which at the time was barred and specifically prohibited by statute. The right to maintain actions against collectors personally for their wrongful acts was settled by this Court prior to the enactment of legislation providing for refunds by the Treasury Department or for suits against the United States for the recovery of taxes (see Point II, *infra,* pp. 9, 10). The petitioners' right to judgment against the respondent in the case at bar was settled by *Bowers* v. *New York and Albany Lighterage Company,* 273 U. S. 346. Section 1106 (a) of the Revenue Act of 1926 provided that "no credit or refund [of outlawed taxes] shall be allowed unless the taxpayer has overpaid the tax", but this provision had been judicially construed as applicable solely to departmental credits and refunds of taxes voluntarily paid, and not to actions against Collectors to recover moneys illegally exacted. (See *infra,* p. 11).

Therefore, prior to the enactment of the Revenue Act of 1928, the petitioners admittedly had a good cause of

action against the respondent, and the District Court so held, but the Court below reversed the judgment because of the provisions of Section 611 of the Revenue Act of 1928, which was enacted on May 29, 1928, during the pendency of the action. The Court below made no mention whatever of Section 716 of the 1928 Act and made only a passing reference to Section 607.

Sections 607, 611 and 716 of the Revenue Act of 1928, provide as follows:

> Section 607. *Effect of Expiration of Period of Limitation against United States.* Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> Section 611. *Collections Stayed by Claim in Abatement.* If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.
>
> Section 716. *Effective Date of Act.* Except as otherwise provided, this Act shall take effect upon its enactment.

Section 607, which took effect on May 29, 1928 (Sec. 716), provides that if a tax has been or should be paid

after the statute of limitations had barred it, such payment *"shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is filed."* The phrases *"shall be* considered", *"shall be* credited or refunded" and "if claim therefor *is filed"* obviously refer to the future and, therefore, although Section 607 relates to cases involving assessments and payments made prior to its enactment, nevertheless, it relates to such cases *only where the refund claim "is filed" after its enactment,* and prescribes what *"shall be"* the Department's action thereon. Section 611 also speaks prospectively and provides that in certain cases the payment of such a tax *"shall not be* considered as an overpayment *under the provisions of Section 607";* that is to say, *"shall* [not] be credited or refunded if claim therefor *is filed".* Reading Sections 607 and 611 together, it is clear that, since Section 607 does not apply to refund claims filed prior to the enactment of the Act, and since Section 611 applies only to cases otherwise falling within the scope of Section 607, Section 611 also does not apply to refund claims filed prior to its enactment.

Paraphrasing Sections 607, 611 and 716 together will show at once that Section 611 was intended to apply only prospectively to the action to be taken by the Treasury Department after the enactment of the Act, on refund claims filed after the enactment of the Act. Thus paraphrased, these three Sections provide:

> Any tax assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto *shall be* considered an overpayment and *shall be* credited or refunded to the taxpayer if claim therefor *is filed,* but if any such tax was properly assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed,

> then the payment of such part (made before or within one year after the enactment of this Act) *shall not be considered as an overpayment* and *shall not be* credited or refunded, even if claim therefor *is filed. This provision shall take effect upon the enactment of this Act.*

The refund claim in the case at bar had been filed and rejected prior to the enactment of these sections. At the time such refund claim was filed and at the time it was rejected it should have been allowed under the law then applicable to the situation, but a statute which merely provides what action "*shall be*" taken if a refund claim "*is filed*" cannot reasonably be construed as having any effect upon rights already accrued by reason of action already taken upon refund claims theretofore filed.

This Court has held that a statute will not be construed retroactively unless such construction is imperatively required by the clear, unequivocal expression of an intention that it shall be so applied. See: *Russell* v. *United States,* 278 U. S. 181; *United States* v. *Magnolia Petroleum Company,* 276 U. S. 160; *Union Pacific R. R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190.

In the case last cited, this Court said at p. 199:

> "* * * the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' "

POINT II.

Section 611 should not be construed as applicable to a personal action against a collector to recover taxes illegally collected, particularly if it is construed as a withdrawal by the United States of its consent to be sued.

The taxpayer's cause of action is one against the Collector personally, based upon the common law and limited solely by Section 3226 of the Revised Statutes, which provides that prior to the institution of suit a claim for refund must have been filed with the Commissioner of Internal Revenue.

Long before taxpayers were given a right of action against the United States for the recovery of taxes, this Court affirmed their right to a personal cause of action against the Collector (*Elliott* v. *Swartwout,* 10 Pet. 137). It has also been stated that a repeal of the statute creating the cause of action against the United States, would not destroy the right of action against the Collector (*De Lima* v. *Bidwell,* 182 U. S. 1, 176-177; see also *Erskine* v. *Van Arsdale,* 15 Wall. 75; *Pacific Whaling Company* v. *United States,* 187 U. S. 447, 453). At common law such an action against the Collector personally did not lie where the tax was paid voluntarily, but only where it was collected under duress or paid under protest, but the 1924 amendment to R. S. 3226 (Sec. 1014, Rev. Act of 1924), dispensed with the necessity of duress or protest.

Prior to the enactment of the Revenue Act of 1928, R. S. 3220 gave taxpayers the right to a refund by the Commissioner of Internal Revenue of taxes *overpaid* or *excessive* or of taxes *illegally collected.* Section 607 of the Revenue Act of 1928 provided that a tax *paid* (i. e., even though correct in amount and paid voluntarily with-

out duress or protest) after the statute of limitations had run, should be considered an *overpayment* of tax and that such *overpayment* should be refunded by the Commissioner of Internal Revenue. In other words, Section 607 brought within the scope of R. S. 3220 certain cases not theretofore covered by it.

Section 611 merely withdrew from the scope of Section 607 (and therefore from the enlarged scope of R. S. 3220) cases where the taxes had been assessed prior to June 2, 1924 and abatement claims had been filed and collection stayed, by providing that in such cases the *payment* shall not be considered an *overpayment,* that is to say, *shall not be refunded by the Commissioner.* The taxpayer's remedy against the Collector for taxes illegally collected was complete without either Section 607 or Section 611 and also without R. S. 3220 and there is nothing in Section 611 which purports to take away that right, as Sections 607 and 611 speak only of refunding or crediting *payments* of taxes which are defined as constituting *overpayments.* Prior to the enactment of the 1928 Act, the Treasury Department had ruled, in conformity with the well-settled doctrine, that a payment under duress is not a payment but is an illegal exaction. (*General Counsel's Memorandum No. 2581,* Int. Rev. Cum. Bull., Vol. VI-2, p. 95.) This interpretation is borne out by the fact that while R. S. 3220 was amended by the Revenue Act of 1928 (Sec. 619-b) so as to harmonize it with Sections 607 and 611, R. S. 3226, relating to *suits* for the recovery of taxes, was not changed.*

The right to this common law cause of action against the Collector in this particular class of cases having been settled by this Court in *Graham* v. *Dupont,* 262 U. S. 234

* It is often said that a personal action against a collector for taxes illegally collected is based on R. S. 3220 and R. S. 3226. This is incorrect; the revised statutes do not confer the right, and R. S. 3226 alone circumscribes it.

and *Bowers* v. *New York and Albany Lighterage Company, supra,* "this affords a special reason for believing that if" Congress had intended to render nugatory or limit those decisions "it would have done so in clear words from which there was no escape", and "it is not to be presumed to do so on language which, literally taken, has a narrower sense;" (*Lincoln* v. *United States,* 202 U. S. 484).

Sections 607 and 611, read together, provide that a tax paid under certain circumstances shall not "be credited or refunded". This is very similar to the phraseology of Section 1106 (a) of the Revenue Act of 1926 which provided that under certain circumstances "no credit or refund shall be allowed". Prior to the passage of the 1928 Act, Section 1106 (a) of the 1926 Act had been construed by the courts, in accord with the Government's contentions, as applying only to departmental refunds of taxes voluntarily paid and as not affecting a taxpayer's right to maintain a personal action against a Collector to recover an outlawed tax illegally collected. See: *Thornhill Wagon Co.* v. *Noel,* 17 Fed. (2d) 407; *Ellay Co.* v. *Bowers,* 25 Fed. (2d) 637; *cer. den.* (after enactment of the 1928 Act) 277 U. S. 606.

When Congress used substantially the same language in the 1928 Act, it must be presumed to have used it with full knowledge of and acquiescence in the construction theretofore placed upon those words by the courts. See: *Kepner* v. *United States,* 195 U. S. 100, 124; *United States* v. *Mooney,* 116 U. S. 104, 106; *Diaz* v. *United States,* 223 U. S. 442, 454; *Logan* v. *United States,* 144 U. S. 263, 301.

The contention, which has been raised in a number of suits arising under Section 611, that the section is valid as a withdrawal by the United States of its consent to be sued, supports the interpretation of the statute for which we have just contended, *viz.,* that it does not affect per-

sonal actions against collectors, but merely the taxpayer's right to a Departmental refund, and possibly the right to bring suit against the United States itself for the recovery of the tax. The argument has no weight in cases where the Collector is sued personally, because the rule of *Railroad Company* v. *Tennessee*, 101 U. S. 337, and *Railroad Company* v. *Alabama*, 101 U. S. 832, that a sovereign may at any time withdraw its consent to be sued, even as to actions theretofore instituted, was held, in *United States* v. *Lee*, 106 U. S. 196, not applicable to suits against Government officers. See also *Minnesota* v. *Hitchcock*, 185 U. S. 373.

It is true that some suits against Government officers are considered in effect suits against the sovereign, but in *Sage* v. *United States*, 250 U. S. 33, this Court held squarely that a suit against a Collector of Internal Revenue to recover taxes illegally collected is not a suit against the United States, and this was reaffirmed in *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, where the contention that the possible allowance of a certificate of probable cause after the entry of judgment in such a case transforms the action into one against the United States was overruled. See also *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Belknap* v. *Schild*, 161 U. S. 10; *United States* v. *Lee*, 106 U. S. 196.

POINT III.

Section 250 (d) of the Revenue Act of 1921 extinguished the liability for taxes for the year 1917 upon the expiration of five years from the filing of the 1917 return.

Section 250 (d) of the Revenue Act of 1921 provides in part as follows:

> "The amount of income, excess-profits, or war profits taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed."

The tax in suit was assessed prior to the enactment of the Revenue Act of 1921 (November 23, 1921) but no proceedings had been instituted for its collection. The time for collection was governed by the 1921 Act (*Bowers* v. *New York and Albany Lighterage Company, supra*) and was not extended by the Revenue Act of 1924 or of 1926 (*Russell* v. *United States, supra;* Sec. 278 (e), Rev. Act 1926).

This Court held in *Graham* v. *Dupont, supra,* that a taxpayer may not enjoin the collection of a tax even upon a showing that the collection would be illegal, but that his only remedy is "to *pay* the tax, and sue to recover it back," and that in such subsequent proceedings he may raise the questions as to the bar of the statute as well as the correctness of the tax.

In *Bowers* v. *New York and Albany Lighterage Co., supra,* this Court held that a tax collected by distraint after it has become barred by limitations may be recovered in a suit against the Collector. Prior to this decision the Court of Claims had denied recovery in *Toxaway Mills* v. *United States,* 61 Ct. Cls., 363, where the tax was paid under duress and protest, on the ground that the statute of limitations on the collection of taxes merely barred the Government's remedy, but did not affect the taxpayer's liability to pay the tax and that, after the plaintiff had paid the tax, even though under protest, he could not predicate an affirmative cause of action on the bar of the statute. The Court of Claims relied upon *Campbell* v. *Holt,* 115 U. S. 620 and similar cases.

When this decision was handed down by the Court of Claims, the Revenue Act of 1926 was pending in Congress. Senator Reed of Pennsylvania, a member of the Senate Finance Committee, before which the act was then pending, thereupon submitted an amendment which in somewhat altered form became Section 1106 (a) of the Revenue Act of 1926 and which provided expressly that the bar of the statute of limitations against the United States in respect of any internal-revenue tax should not only operate to bar the remedy but should also extinguish the liability. In support of this amendment, Senator Reed made the following statement (Congressional Record, Vol. 67, part 4, p. 3531):

> "Mr. President, just a word in explanation of this amendment. The necessity for it arises from a very peculiar case. In a recent decision in the Court of Claims it has been held, in substance, that after the statute of limitations has run against the collection of a tax, the collector may nevertheless issue his distraint and collect the tax by a distraint, and then if the taxpayer brings suit against the United States to recover it back, he,

> being the plaintiff, cannot plead the statute of limitations, although the United States would have been barred from a suit for the tax because the statute had run. It is a preposterous result, it seems to me, and a very great hardship to the taxpayer, to allow such a condition to continue, and while I feel reasonably confident, with all respect to the Court of Claims, that that case will be reversed on appeal, I do not think we ought to allow even a possibility that it will not remain, and we ought to correct it now."

The report of the House Conferees who reported out the amendment in its final form, contained the following explanation:

> "This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*) although in a case representing the specific point, this opinion would probably not be followed by the Supreme Court. (See Taft, C. J., in *Graham* v. *Dupont*, 262 U. S., 234, 256, 258)." *House of Representatives Report No. 356, 69th Congress, 1st Session*, p. 55.

Thereafter the Toxaway Mills Company appealed to this Court whereupon the Solicitor General of the United States filed a confession of error and on that the case was reversed. (273 U. S. 781).

It therefore appears that Section 250 (d) of the Revenue Act of 1921 is a statute of limitations which did not effectively bar the remedy, because despite its provisions the Government was still able to collect the tax after the expiration of the period therein prescribed, and also if the taxpayer-debtor paid the tax after the expiration of the period of limitations, he could maintain an affirmative cause of action for its recovery. It cannot be said that such a statute "merely barred the remedy." If it did not extinguish the liability, it had little or no practical effect.

In *Citizens' Bank* v. *Miller-Link Lumber Co.*, 16 Fed. (2d) 163, and *Bashara* v. *Hopkins*, 290 Fed. 592, it was held that the limitation upon the collection of income taxes extinguished the liability for the tax. To the same effect, see *United States* v. *John Barth Co.*, 27 Fed. (2d) 782, reversed on other grounds, 279 U. S. 370.

The statute is not a general statute of limitations, but an integral part of the revenue laws and is therefore within the rule announced in *William Danzer & Company Inc.* v. *Gulf & Ship Island Railroad Company*, 268 U. S. 633; *Morgan's Louisiana & Texas Railroad & Steamship Company* v. *Cocke*, 273 U. S. 656; and *Peninsula Produce Exchange* v. *New York P. & N. Railroad Company*, 152 Md. 594; 137 Atl. 350; aff'd. 276 U. S. 599. *Davis* v. *Mills*, 194 U. S. 451, 454, disposes of the contention that, as to taxes for 1917 and prior years, the limitation was contained in a subsequent statute. (As to taxes under the 1918 Act, which are involved in many suits similar to the one at bar, Sec. 250 (d) of the 1921 Act merely replaced the substantially identical provision of Sec. 250 (d) of the 1918 Act).

It has been settled that the principle announced in these cases is equally applicable to the Government—that is to say, the United States may set up against itself a statute of limitations in such language as to extinguish absolutely its right after the expiration of the period fixed. See *United States* v. *Chandler-Dunbar Company*, 209 U. S. 447; *Winona & St. Peter Railroad Company* v. *United States*, 165 U. S. 483; and *United States* v. *Jones*, 218 Fed. 973.

It is therefore immaterial that Section 612 of the Revenue Act of 1928 repealed Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment. It was merely declaratory of the pre-existing law and its

repeal was equally without significance. However, the validity of the attempt to repeal it retroactively has been denied. See *Wyman, Partridge & Co.* v. *United States* (Ct. of Cls.), 41 Fed. (2d) 886; *United States* v. *John Barth Co.*, 27 Fed. (2d) 782; *Dobbins* v. *Commissioner*, 31 Fed. (2d) 935; *Wettengel* v. *Robinson*, 289 Pa. 525; 136 Atl. 673. Furthermore, Section 906 (e) of the 1926 Act which provides that a finding by the Board of Tax Appeals that collection of any tax was barred by any statute of limitations should be considered as a decision that the taxpayer owed no tax, was just as effective as Section 1106 (a) and Section 906 (e) has not been repealed, but was re-confirmed by Section 601 of the 1928 Act.

POINT IV.

Section 611 of the Revenue Act of 1928, if construed as an attempt to deprive taxpayers of their vested rights in the completed bar of Section 250 (d) of the Revenue Act of 1921, is void under the Fifth Amendment to the United States Constitution.

Section 250 (d) of the Revenue Act of 1921 having operated to extinguish the taxpayer's liability for the tax in suit upon the expiration of five years from the filing of his return, a statute enacted by Congress after the bar of the statute had become complete, extending the period of limitation and in effect reviving the liability for the tax would be unconstitutional and void as a deprivation of property without due process of law under the Fifth Amendment to the United States Constitution. *William Danzer & Company* v. *Gulf & Ship Island Railroad Company; Morgan's Louisiana & Texas Railroad & Steamship Company* v. *Cocke; Peninsula Produce Exchange* v. *New York P. & N. Railroad Company; United States* v. *John Barth Company, supra;*

Phillips v. *Grand Trunk Railway*, 236 U. S. 662; *Kansas City Southern Railway* v. *Wolf*, 261 U. S. 133. *Campbell* v. *Holt*, 115 U. S. 620 is distinguishable—it dealt with the ordinary statute which merely barred the remedy and did not extinguish the liability and therefore there was no vested right involved. See *Toxaway Mills* v. *United States; Wyman, Partridge & Co.* v. *United States; Wettengel* v. *Robinson; supra.*

In *Regla Coal Company* v. *Bowers*, 37 Fed. (2d) 373, the Court incorrectly described the taxpayer's right of recovery as being dependent on "sovereign grace" (see *supra*, pp. 11-12).

This distinction disposes of the Government's contention that Section 611 merely withdrew from the taxpayer a pre-existing remedy. We have shown, *supra*, that Section 611 should be construed as merely withdrawing one of the taxpayer's remedies, *viz.*, his right to a departmental refund of the tax. But the Government contends that the Section applies also to personal actions against the Collector, like the suit at bar, and thus deprives the taxpayer of every remedy. A statute which bars every remedy is not remedial, but goes to the substance. See *Wade on Retroactive Laws*, p. 241.

And that a right of action is as much within the protection of the constitutional prohibition as tangible property has been settled by this Court in *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338, where it was held that a State Legislature "cannot take away from a private party a right to recover money that is due when the Act is passed."

Since Section 611 did not reimpose the tax (see Point V, *infra*, p. 19), there was not at the time the money was exacted by the Collector, and is not now, any tax liability in existence. The tax was imposed by the

Revenue Act of 1916; all liability for the taxes imposed thereby, from and after the expiration of five years from the return date, was extinguished by the Revenue Act of 1921 and since that date the taxpayer has never been under any legal liability to pay the amount exacted from him. Upon the expiration of the period of limitation, the Collector became *functus officio* and his exaction of the amount from the taxpayer was a void act, not subject to ratification even by an express act of Congress. See *McCord* v. *Sullivan*, 85 Minn. 344.

POINT V.

Section 611 did not reimpose the tax in suit nor ratify the collection thereof.

United States v. *Heinszen & Company*, 206 U. S., 370 and *Rafferty* v. *Smith, Bell & Company*, 257 U. S. 226, are cited in support of the validity of Section 611 as a reimposition of the tax or a ratification of its collection. Those cases held that Congress had ratified the unauthorized collection of certain custom duties. Admitting that Congress had the power, the decisions were inescapable. In the *Heinszen* case the Act of Congress provided:

> "That the tariff duties * * *, are hereby legalized and ratified, and the collection of all such duties * * * is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

The ratifying Act in the *Smith, Bell & Company* case provided that:

> "The taxes imposed by the Philippine legislature * * * are legalized and ratified, and the collection of all such taxes made under or by authority

> of such Act * * * is legalized, ratified, and confirmed as fully to all intents and purposes as if the same had by prior Act of Congress been specifically authorized and directed."

In *Lincoln* v. *United States*, 202 U. S. 484, involving a similar question, the ratifying Act provided:

> "That the action of the President of the United States heretofore taken * * * as set forth in his order of July twelfth, eighteen hundred and ninety-eight, * * * together with the subsequent amendments of said order, are hereby approved, ratified, and confirmed, and the actions of the authorities of the government of the Philippine Islands, taken in accordance with the provisions of said order and subsequent amendments, are hereby approved."

This Court said, p. 498:

> "The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order."

This Court said further, that:

> "This construction is favored by the consideration that the suits had been begun when the Act * * * was passed, and that, *even if Congress could deprive plaintiffs of their vested rights in process of being asserted,* * * * still *it is not to be presumed to do so on language which, literally taken, has a narrower sense.*
>
> "Moreover, the Act * * * was passed with full knowledge and after careful consideration of the decisions of this Court, and Congress was aware that grave doubt, at least, had been thrown upon its power to ratify a tax under circumstances like the present. *De Lima* v. *Bidwell*, 182 U. S. 1, 199, 200. This affords a special reason for believing that *if it had intended to encounter the limitations of that case it would have done so in clear words from which there was no escape.*

> "It should also be remembered that there was a powerful opposition in Congress and that the phraseology of the Act probably represents all that it was deemed safe to ask. *Every consideration requires that the ambiguous language of the Act should not be stretched beyond the exact and literal meaning of the words.*" (Italics supplied.)

Every consideration which induced this Court to adopt a strict construction of the statute in the *Lincoln* case, *supra*, is present in the case at bar. The case at bar and numerous similar cases had been begun when Section 611 was enacted with full knowledge by Congress of this Court's decision in *Bowers* v. *New York and Albany Lighterage Company*, *supra*, and the decisions of the Federal Courts construing the similar phraseology of Section 1106 (a) of the Revenue Act of 1926 as applying only to departmental refunds and not to actions against collectors (see *supra*, p. 11). In House of Representatives Report No. 2 (70th Congress, First Session), accompanying the Revenue Act of 1928, it was stated at page 34 that:

> "Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected."

The Committee stated further:

> "In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the Revenue Act."

But this provision to authorize the collection of outlawed taxes not theretofore collected was eliminated before the bill was enacted, due to objections raised during the course of its consideration in Congress. It is therefore safe to assume that the phraseology of Section 611 as enacted "represents all that it was deemed safe to

ask". The language of this section, taken literally, certainly does not reimpose the income tax for the year 1917, nor does it extend the time within which such taxes might be collected, nor does it ratify or validate the action of the various collectors who had illegally exacted such taxes.

In the *Lincoln* case, *supra*, this Court pointed out, at page 499, that:

> "It would be inadmissible to lay down as a general rule that a particular ratification covered what was not, in the judgment of the courts, included or intended to be, simply because it might be thought to have been otherwise unnecessary."

POINT VI.

Section 611, if construed as reimposing the tax in suit or ratifying its collection, is void under the Fifth Amendment.

However, even if it should be considered that the intent of Congress was plain to reimpose the tax or ratify its collection, the statute is nevertheless unconstitutional in that it is discriminatory, arbitrary and unjust to such an extent as to constitute the taking of property without due process of law.

We have pointed out above that the statute did not authorize the collection of any taxes. In *Regla Coal Company* v. *Bowers*, *supra*, the District Court for the Southern District of New York indicated that it considered that the portion of the section which refers to taxes collected within one year after its enactment authorizes such collections to be made. In any event, the court stated that such collections could not be enjoined and that if the taxes were once collected, they could not

be recovered because of Section 611. The court added that the fact that some taxpayers might escape because the collector did not act within the one year period "is beside the point" and that "it must be assumed that the executive department of the government will act with due diligence".

Prior to the decision of this Court in *Bowers* v. *New York & Albany Lighterage Company, supra,* handed down on February 21, 1927, the Treasury Department did, after the expiration of the five-year period, collect taxes which had been assessed within the five-year period but this was due to the Department's mistaken interpretation of the limitation provision. After this Court's decision in the *New York & Albany Lighterage* case, the Department ceased collecting such outlawed taxes and it has not resumed the practice even after the enactment of Section 611, but has instructed Collectors that Section 611 gave them no right to collect. See, *supra,* p. 11; also *Mimeograph No. 3660* issued by the Commissioner of Internal Revenue, Int. Rev. Cum. Bull., Vol. VII-2, p. 82; *General Counsel's Memorandum No. 4197, Id.,* p. 87; *Wettengel* v. *Robinson, supra.*

Furthermore, if the case fell otherwise within the provisions of Section 611, but if, when the taxpayer's abatement claim was decided, the taxpayer did not pay the tax under protest and sue for a refund, but appealed his case to the Board of Tax Appeals, he escaped liability for the tax because under the provision of Section 906 (e) of the Revenue Act of 1926 or of Section 601 of the 1928 Act, if the Board found that collection of the tax was barred by limitations, its finding was considered to be a decision that no tax was owing. See *Philadelphia Lawn Mower Co.* v. *Commissioner,* 16 B. T. A. 435, being one of several cases where such a decision was rendered after the enactment of Section 611.

If when the tax was assessed against the taxpayer, he did not file an abatement claim, but filed a claim for credit—that is to say, if he did not deny the correctness of the assessment but merely claimed that he had overpaid some other tax which should, therefore, be credited against the assessment admittedly owed by him, and if such claim for credit remained under consideration in the Treasury Department until after the five-year period of limitations had expired and until after this Court's decision in the *New York & Albany Lighterage* case, *supra*, the Treasury Department, if it then decided that the taxpayer had not overpaid the other tax, nevertheless did not collect the assessment and had no authority to collect it. If the Department decided that the taxpayer had overpaid the other tax, it nevertheless did not credit such overpayment against the outlawed assessment, for that would have amounted to a collection of the outlawed assessment, but it refunded the overpayment to the taxpayer, who thus in either event escaped the payment of the additional assessment against which he had filed the claim. This was also in accordance with the ruling of the General Counsel of the Bureau of Internal Revenue. See: *General Counsel's Memorandum No. 6296*, Int. Rev. Cum. Bull., Vol. VIII-2, p. 152.

Considered as a reimposition of the tax or a ratification of its collection, Section 611 is therefore void because it is arbitrary. It did not provide for the collection of the tax from all persons originally liable therefor, but at the most it merely reimposed the liability upon a certain limited class of taxpayers, arbitrarily selected without any sound basis for a distinction.

There was not even a sound basis for distinction between taxpayers who filed and those who did not file abatement claims. The Treasury Department had two regular methods of assessing and collecting additional

income taxes: The Department either notified the taxpayer of its intention to assess a further tax and gave him an opportunity to file a protest and to have hearings thereon, or the Department assessed the tax without any prior notice or consideration of the merits and then notified the taxpayer and permitted him to file an abatement claim. If the taxpayer was notified and given an opportunity to protest before the assessment, an abatement claim was not entertained (*Sec. 250 (d), Rev. Act of 1921; Articles 1006* and *1012* of *Regulations 62*). And where abatement claims were filed the Collector was not authorized to delay collection of the tax pending consideration of the claim, where such delay would jeopardize collection. The filing of the claim did not toll the statute (*General Counsel's Memorandum No. 2757*, Int. Rev. Cum. Bull., Vol. VII-2, p. 302) and *Article 1032* of *Regulations 45* (promulgated under the 1918 Act) and *Article 1032* of *Regulations 62* (promulgated under the 1921 Act) specifically provided that:

> "The filing of a claim for abatement does not necessarily operate as a suspension of the collection of a tax, or make it any the less the duty of the Collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

Article 261 of *Regulations 33* (promulgated under the 1916 Act) was substantially identical. That the imminent expiration of the statute of limitations constituted "jeopardy", see *I. T. 1333*, Int. Rev. Cum. Bull., Vol. I-1, p. 305 and *Veeder* v. *Commissioner*, 36 Fed. (2d) 342, construing the similar language of the proviso at the end of Sec. 250 (d) of the Revenue Act of 1921.

The proceedings on the protest prior to assessment, or the proceedings on the abatement claim after assessment were merely a part of the departmental procedure in *determining and assessing* the tax. It was the Department's duty under Section 250 (d) of the Revenue Act of 1921 to *determine, assess and commence proceedings to collect* the tax, all within the five year period, and the taxpayer was entitled to a hearing either before or after assessment, unless the granting of a hearing would jeopardize collection of the tax. If the Department chose to assess first and then determine, there is no good reason for placing the taxpayer in a worse position than if the Department had chosen first to determine and then assess, yet Section 611 is not claimed to cover a case where both assessment and collection of the tax were stayed on a protest pending the determination of the amount to be assessed and collected. See: *General Counsel's Memorandum No. 6308*, Int. Rev. Cum. Bull., Vol. VIII-1, p. 132.

In *Gulf, Colorado & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150, this court said at page 159 that "arbitrary selection can never be justified by calling it classification". See, also, *Schlesinger* v. *Wisconsin*, 270 U. S. 230; and *Frew* v. *Bowers*, 12 Fed. (2d) 625, cited with approval by this Court in *Nichols* v. *Coolidge*, 274 U. S. 531.

The test as to whether a reimposition or ratification of a tax is valid must, under the doctrine announced by this Court in *Forbes Boat Line* v. *Board of Commissioners, supra*, depend upon whether "if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power," and, under the doctrine announced in *Charlotte Harbor Railway* v. *Welles*, 260 U. S. 8, whether the Legislature can authorize the act *at the time it ratifies it*. Consequently, in order to support Section 611 as a

reimposition or ratification of the tax, this Court must decide that Congress could have imposed a tax in 1928 for the calendar year 1917 upon the arbitrary basis therein attempted.

Even so, it must not be overlooked that the fact that a classification is made retroactively may alone demonstrate that such classification is arbitrary. This was decided, in effect, in *Forster* v. *Forster*, 129 Mass. 559, where the Court declared unconstitutional a very similar statute which attempted to validate certain tax sales but excepted certain cases from its operation, basing the distinction "upon the questions, whether a suit to recover it has or has not been already commenced; whether the person who owned it at the time of the sale for taxes, * * * has kept his land, or has parted with it; and whether his grantee succeeded to his title before or since" a prior decision of the Massachusetts Court.

Chief Justice Gray, later an Associate Justice of this Court, writing the opinion, said at page 561 that:

> "While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land against his will in discharge of his tax depends upon no considerations of equity, but upon a strict compliance, on the part of the municipal officers, with the regulations *previously prescribed* by statute for the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property." Citing *Williams* v. *Peyton*, 4 Wheaton 77. (Italics supplied.)

The Court said p. 562:

> "We find it impossible to reconcile this statute with the fundamental principles, declared in the Constitution of the Commonwealth, that every subject has the right to be protected in the enjoyment of his property according to standing laws; that

his property shall not be appropriated, even to public uses, without paying him a reasonable compensation therefor; that he shall not be deprived of his property or estate, but by the judgment of his peers or the law of the land; and that the legislative department shall never exercise the judicial power."

We submit that there is not as much basis for the classification claimed to have been made by Congress in Section 611 as for the classification attempted in the above case. See also, *Cummings* v. *Missouri*, 4 Wall. 277, 319, 320, 325, and *Ex Parte Garland, Id.*, 333, dealing with *ex post facto* laws.

Respectfully submitted,

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New York, September 23, 1930.